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CURRENT TOPICS.

In consequence of the fact that our system of law is one of the inheritances which we derived from the mother country, our bar has naturally always been accustomed to look upon the recognized authorities in her jurisprudence with a respect amounting almost to veneration. Any evidence of a reciprocity of this esteem is likely to be received by the bar here with a satisfaction disproportioned to its real importance. It naturally produces a glow of pride to know that the appreciation of the English public of American productions is not confined to wheat, and beef, and cotton, and machinery and manufactured goods, but that American jurists and American adjudications are quoted (as persuasive authority, of course) and received with creditable favor in the English Appellate courts. Says a recent issue of the *Law Times*: "In one of the judgments delivered by the late Lord Chief Justice Cockburn during the last year of his life, that in Scaramanga v. Stamp (42 L. T. Rep. N. S. 840; L. Rep. 5 C. P. Div. 295-303), he spoke with a just appreciation of the valuable labors of American jurists, and after pointing out that, though several cases on the subject then under consideration had come before and been decided by the courts of the United States, the matter was one of first impression for the courts of this country, went on to say that he was glad to think that, in declaring or practically making the law, he had the advantage of the assistance afforded by the decisions of the American courts and the opinions of American jurists. And he remarked that, although the decisions of the American courts were of course not binding on those here, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source like our own—entitled their decisions to the utmost respect and confidence on the part of English judges. It is rather to be feared that the appreciation of American law expressed by Sir A. Cockburn is not so widely felt in this country as should be the case. The writings of Mr. Justice Story and some other American legal authors are in great esteem, but the manner of appointment of the judges in some of the American States, and the mode of their tenure of office, has occasioned a distrust of their decisions, which has to some degree extended to the legal precedents of other States in which few flaws can be found. Notwithstanding, however, the undoubted existence of such a feeling, the late Lord Chief Justice has not been the only one of our judges who has recently derived guidance and support from the pages of the American reports. In Steel v. Dixon (45 L. T. Rep. N. S. 142; L. Rep. 17 Ch. Div. 825), a case which had to do with a point of some considerable importance in the law of co-sureties, no English cases much to the point could be produced; but Mr. Justice Fry, who decided the case, felt himself, as he stated, much strengthened in coming to the conclusion to which principle conducted him, by the American authorities of Miller v. Sawyer, 30 Vt. 412, and Hall v. Robinson, 8 Iredell, 56, from the judgments in which cases citations were incorporated by the learned judge in his own decision. If this example of research were more frequently followed, light would often be thrown upon doubtful points.'

Our readers will remember the case of Dennick v. Central Railroad Co. of New Jersey (13 Cent. L. J. 393, since reported in 103 U. S. 11), decided at the last term of the Federal Supreme Court; it was held that where the statutes of two States substantially agreed in giving the administrator a cause of action for negligence resulting in death, the action may be maintained in one jurisdiction, though the injury was inflicted and the death occurred in the other. In a recent decision in the Circuit Court for the Eastern District of Michigan (Boyd v. Clark, 8 Fed. Rep. 849), the doctrine has been somewhat extended in a case in which BROWN, District Judge, held, that where a statute of the province of Ontario, gave compensation for death caused by the wrongful act of another and further provided that action should be brought within twelve months after such

death, this limitation was also applicable to actions brought ln the State of Michigan under this statute.

SOME CASES ON "DISCRETION."

It is often important to determine and limit the latitude of discretion vested in officers, boards and corporations, both public and private. Cases are constantly arising in which an inviolable discretion is pleaded. It is held that public officers are not liable personally for official acts done in the exercise of a discretion; that writs of mandate will not go to compel the performance of duties which are discretionary; that the appointment of receivers is discretionary with the court; that the interference of a court of equity is discretionary. It would be impossible to enumerate all the classes of cases in which the question of a discretion may arise. To define whether there is a discretion, and the extent of the discretion in each particular instance, is very difficult. Every case is *sui generis*—has some peculiar, characteristic fact which distinguishes it from every other case; and no definition which seems to cover all the cases has yet been made.

Burrill's Law Dictionary defines "discretion" as, "The liberty or power of acting according to one's own ideas of right, without being bound by any fixed rules."

Webster's Dictionary defines the adjective "discretionary," as "Unrestrained except by discretion or judgment; as, the President of the United States is, in certain cases, invested with discretionary powers to act according to the circumstances."

Worcester's Dictionary defines the same adjective as, "Controlled only by judgment."

Probably the best definition of a "discretion" which has yet been made is a negative definition. The opposite of "discretionary" is "ministerial." Worcester's definition of "ministerial" is, "Acting at the command of another; acting as agent for another, or under superior authority; subservient; assistant."

Bouvier's Law Dictionary defines "ministerial" to be, "That which is done under authority of a superior; opposed to judicial; as, the sheriff is a ministerial officer bound to obey the judicial commands of the court. When an officer acts in both a judicial and ministerial capacity, he may be compelled to perform ministerial acts in a particular manner; but when he acts in a judicial capacity, he can only be compelled to proceed; the manner of doing is left entirely to his own judgment."

The best definition of a "ministerial" act is, "One which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." [1]

It follows, then, that where these elements enter into the performance of an act, it can not be discretionary.

An act is none the less ministerial, however, because the officer may have to exercise his judgment and satisfy himself that the state of facts, under which it is his right and his duty to perform the act, exists. Every selectman before the appointment of an overseer, and every sheriff previous to taking bail, makes inquiry to aid him in the faithful discharge of his duty. Justices of the peace, previous to appointing freeholders to assess damages sustained in taking land for a public highway, make inquiry and exercise their judgment as to the fitness of the persons appointed to discharge this duty. These acts are all nevertheless ministerial duties.[2] Also, a board of inspectors of an election are obliged to exercise their judgment as to whether the voters who present themselves are qualified to vote according to the law; to count the ballots and decide which candidate has received the highest number of votes. But their duty is ministerial and not discretionary.[3] And the approval of an official bond, as a sheriff's bond, by a board of county commissioners, or an appeal bond by a justice of the peace, is not a discretionary act, although the officer must exercise his judgment as to whether the bond is sufficient or not.[4]

[1] Flournoy v. City of Jeffersonville, 17 Ind. 169.

[2] Betts v. Dimon, 3 Conn. 107; Crane v. Camp, 12 Conn. 463; Flournoy v. City of Jeffersonville, *supra*.

[3] Moses on Mandamus, p. 90; State of Iowa *ex rel.* Rice v. The County Judge of Marshall County, 7 Iowa, 186; State of Iowa *ex rel.* Byers v. Bailey, 7 Iowa, 390; Luce v. Mayhew, 13 Gray, 83; Strong, Petitioner, etc., 20 Pick. 484; Kistler v. Cameron, 39 Ind. 488; Brower v. O'Brien, 2 Ind. 423.

[4] Board of Commissioners of Boone County v. The State *ex rel.* Titus, 61 Ind. 379; Indianapolis, etc. R. Co. v. Beem, 63 Ind. 490.

Although a judge must exercise his judgment as to whether a bill of exceptions is true or not, or as to whether the circumstances entitle a party to a new trial, the signing of a true bill of exceptions and the granting of a new trial are not discretionary, but ministerial acts.[5] Therefore, any definition of discretion which makes the exercise of judgment or the intellectual faculties a test, is at fault, and is not broad enough to cover all the cases which may arise. Bouvier's Law Dictionary, in defining "ministerial," seems to confound a "judicial" act and a "discretion." The Constitutions of all the States, and of the United States, vest the judicial power in courts, and designate the courts which shall exercise the judicial function. Hence, none but courts can perform a "judicial" act. On the other hand, any person, board or corporation may be vested with a discretion.

It is very important to keep in view the extent of any discretion which may be given an officer. Because a part of the duties of an officer is discretionary, he is not therefore beyond control as to all of his duties. If part only of his duty is discretionary, he is responsible for the performance of that part which is not discretionary. Where duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duties are violated, the officer, although for the most purposes a judge, is civilly responsible for this misconduct. [6]

An important distinction has also been made between the judgment of an officer or board in a matter left to their discretion, and their judgment as to the extent of their discretion. Courts do not hesitate to interfere and hold the officer responsible in the latter case. The uncontrollable discretion of the officer includes only his judgment upon the very subject-matter which, by law, he may determine, and does not include his judgment as to the extent of his own authority or discretion. His judgment as to what the law has allowed him to determine will be controlled, otherwise officers might assume unlimited power.[7]

The rule seems firmly established that discretionary power exists only where there is a decision on some subject which the law has given the power to decide on, with the intent that such decision should be final, unless changed by some direct appeal or review; and if the officer should assume to act upon a matter not intrusted to him, he will be held answerable. [8]

Where the powers of an officer or board are partly discretionary and partly ministerial, the discretionary duties having been performed, the ministerial duties may be enforced. [9]

The fault with most definitions of "discretion" is that they ascribe to the officer an arbitrary choice or judgment. This is not in accordance with the views of some of the greatest lawyers. Lord Hardwicke speaks of the appointment of a receiver "resting in the sound discretion of the court." [10]

Judge Story refers to the interference of a court of equity as "a matter of mere discretion; not indeed of arbitrary and capricious discretion, but of sound and reasonable discretion, '*secumdum arbitrium boni judicis.*'" [11]

"Discretion," said Lord Mansfield, "does mean and can mean nothing else but exercising the best of their judgment upon the occasion that calls for it; yet if this discretion be willfully abused, it is criminal and ought to be under the control of this court. * * * * This court has no power or claim to review the reasons of the justices of the peace upon which they form their judgments in granting licenses, by way of appeal from their judgments or overruling the discretion entrusted to them; but if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information; or

[5] People *ex rel.*, etc. v. Superior Court of New York, 5 Wend. 114; 50 Ind. 1.

[6] Rochester White Lead Co. v. City of Rochester, 3 N. Y. (3 Comst.) 463.

[7] State *ex rel.*, etc. v. The Common Council, etc., 9 Wis. 254; State v. Hastings, 10 Wis. 518; State v. Wilson, 17 Wis. 709; McCollough v. The Mayor, etc. 23 Wend. 458; McDougal v. Roman, 2 Cal. 80; Citizens' Bank of Steubenville v. Auditor of State, 6 Ohio St. 318; Moses on Mandamus, p. 86.

[8] High on Ex. Legal Rems., sec. 69.

[9] People v. Schenectady, 65 Barb. (N. Y.) 408; High on Ex. Legal Rems., sec. 35; 25 Ind. 486; 29 Ind. 99; 34 Ind. 471.

[10] Skip v. Harwood, 3 Atk. 564.

[11] 2 Story's Eq. Jur., secs. 693, 742, 769; Goring v. Nash, 3 Atk. 188: Buckle v. Mitchell, 18 Ves. 111 Revel v. Hussey, 2 B. & B. 288.

even possibly by action, if the malice be very gross and injurious."[12] In this case a motion was made for an information against two justices of the peace for arbitrarily, obstinately, and unreasonably refusing to grant a license to one H. D. to keep an inn at Eversley. Lord Mansfield held that if their conduct appeared to be partial, oppressive, corrupt or arbitrary, they might be called upon to show the reasons which guided their discretion.

When an officer exercises a discretion willfully and maliciously to the damage of any person, an action will lie against him.[13]

But an officer will not be punished for an error in judgment,[14] where there is no malice,[15] or unreasonable and arbitrary abuse of the trust reposed in him.

In all cases where it is said a discretion is given, by it is meant a sound discretion and according to law, for the courts have power to and will redress things otherwise done.[16]

Where a board is directed to have and determine whether a claim is just or not, and without reference to whether the claim is proved or not, the board rejects the claim, this does not answer the demands of the order. It is the same as a refusal to act at all, and they will be compelled to do what they are commanded to do.[17]

Courts will not set up their judgment in opposition to the judgment of a board of supervisors as to what is a "reasonable compensation" for services performed by a constable for the public, no sum having been fixed by law. It is the judgment of the board, and not the courts, to which the legislature leaves the decision of the matter. But if the board refuse to allow anything, either upon the ground that they have no discretion upon the subject, or that the officer has no right to compensation, then the court will interfere and determine whether the board has power to make an allowance and whether the officer is entitled to be paid. Where a "discretion" is spoken of, a sound legal discretion is meant, and not an arbitrary *sic volo*.[18]

[12] Rex v. Young, 1 Burr. 556.
[13] Tompkins v. Sands, 8 Wend. 462.
[14] Rex v. Cox, 2 Burr. 785.
[15] Harman v. Tappenden, 1 East, 556; 2 Ld. Raymond, 938, 958; 1 East, 562; 11 Johns. 114, 120.
[16] Estwick v. City of London, Styles, 43.
[17] 56 Barb. (N. Y.) 453.
[18] People *ex. rel.* etc. v. Superior Court of New York, 5 Wend. 114.

From the authorities noted the rule seems to be that a "discretion" is where a person is left to his own choice or judgment within the bounds of reason, justice, and morality, uncontrolled by any superior authority or fixed rules. This is probably as comprehensive a definition as can be deduced.

CHARLES MARTINDALE.

Indianapolis, Ind.

NEGLIGENCE IN RELATION TO BILLS, NOTES AND CHECKS.

That a man may incur a liability more extensive than he intended and was arranged between him and the person to whom he hands the bill by putting his name to a blank bill, and that the rule which makes a bill void even at common law if, after issue, an alteration is made in a material part, is subject to the limitation that when the bill has been so carelessly written as to allow of an interpolation being made so as to increase the amount without being liable to detection, the bill is good for the increased amount in the hands of a *bona fide* holder for value, are settled rules of law. The principle, however, on which these rules depend has been variously, and, it seems to us, sometimes wrongly, stated. We shall consider what these rules are, and what is the real principle on which they rest.

The rule as to acceptances and indorsations of blank bills can not be better stated than in the words of the court in Foster v. MacKinnon:[1] "If a man write his name across the back of a blank bill stamp and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover." In the United States, where there is no stamp, the amount for which the blank may be filled up is unlimited.[2] It has been usual, as we shall see when we come to a detailed exposition of the cases, to explain this on the ground that by signing such a paper the per-

[1] L. Rep. 4 C. P. 704.
[2] Byles on Bills, 12th ed., 188.

son signing gives an implied mandate to fill up with any sum the stamp will cover, or any sum whatever when there is no stamp. Whatever may be the real principle, clearly it is not this. The last illustration — the case where there is no stamp, which is a logical consequence of the principle—shows its absurdity. No human being in signing a paper intends to make himself liable to an unlimited amount—to the whole extent of his fortune, or more than the whole extent of his fortune. If one signs a bill the stamp of which will cover £100, and in parting with it says that the sum to be filled in is £10, it can not be said that there is an implied mandate to fill it in with £100. On the contrary, there is an express injunction not to do so. Besides, if there were such a tacit mandate, the acceptor would be liable to the full extent even to the person to whom he handed the bill, while, in fact, he is liable only to a *bona fide* holder to the extent for which value has been given.

The true ground of liability, it appears to us, is just this, that the acceptor has been in fault, has been negligent, and in a question with an innocent third party he must bear the consequences of his fault. The case is an illustration of the broad general principle that when of two innocent parties one or other must suffer from the fraud of a third party, the one who must bear the loss is he who has been in fault, and whose fault has given occasion to the loss. A person who, intending to accept a bill for £10, signs a blank paper bearing a stamp that will cover £100, gives an opportunity to the person to whom he parts with the bill to perpetrate a fraud; and if a third party, acting in good faith, gives value for the bill filled up to the full amount of £100, the acceptor must suffer, not the holder.

In Schultz v. Astley,[3] the liability which an acceptor incurs by signing a blank bill was carried so far as to make him responsible to the amount the stamp will cover not only when the bill had been received by a third party acting *bona fide*, but when it had been drawn by a third party. The case was referred to by Mr. Justice Crompton in a later case,[4] as one which went to the utmost extent of the law. In the United States it has even been held that if the blank paper comes into the hands of a holder without notice, he may fill up the blank with a larger sum than the original holder was authorized to insert,[5] which is carrying the liability to a preposterous extent, although it is a logical consequence of the erroneous principle of taci mandate. If the true principle applicable to this class of cases be that the acceptor must bear a loss to which his own negligence has given occasion, this ruling is not supportable. The acceptor has not been solely to blame. There has been negligence, at the very least, on the part of the third party. Receiving a blank bill, he has been put on his guard, and ought to have inquired of the acceptor what was the true amount of the obligation.

Another consequence of the doctrine as to the liability incurred by accepting a bill in blank is that the acceptor is liable to a *bona fide* onerous indorsee, in whatever name the bill has been drawn and indorsed by the original holder. In London and Southwestern Bank v. Wentworth,[6] the liability of an acceptor in the case of what was really a forged indorsement arose in a peculiar set of circumstances. The defendant Wentworth had gone to an advertising money-lender, who undertook to procure for him a loan for £400 on getting a bill for £500. On the faith of this, the defendant gave the money-lender a blank acceptance on a paper bearing a stamp sufficient to cover the £500. An obligation was given that the bill was to be negotiated, but nothing was said as to who was to draw or indorse it. Wentworth incautiously handed the bill over without getting the £400. When the bill was presented to the bank to be discounted it bore to be drawn and indorsed by "S. H. Head." The signatures of the drawer and indorser were in the same handwriting. The bill was presented at the bank by one Villars, a partner in a respectable firm of upholsterers, who had an account with the bank. Villars stated that his firm had furnished the offices of a person named Samuel Head. On making inquiries of Wentworth's bankers, the answer to which proved satisfactory, the bank discounted the bill, making advances equal to the full value of the bill, £500. It was admitted that the bank had taken the bill in good faith, and without

[3] 2 Bing. N. C. 544.
[4] Reported in 2 L. J. Rep. (Q. B.) 293.
[5] Byles on Bills, 188.
[6] L. Rep. 5 Exch. Div. 96.

notice of any irregularity. On the bill falling due, Wentworth was applied to. He disputed his liability, and consequently an action was raised by the bank. At the trial he sought to bring evidence to show that the drawing and indorsement were forgeries, and also to identify a witness, Samuel Head, with the "S. H. Head" represented to be the payee and the person as from whom Villars took the bill. This evidence was rejected as immaterial. On a motion for a new trial, on the ground of misdirection, the Exchequer Division sustained the ruling. On behalf of the acceptor it was urged that, although by accepting a bill in blank the acceptor gives authority to fill in even a fictitious name, yet he could not have intended to authorize the person to whom he gave the bill to commit a forgery by inserting the name of a real person. This, said the Exchequer Division, "raises a novel question, and one of some difficulty." The court held the acceptor liable. If the acceptance had been made after the drawer's name had been inserted, the case might have been different, the acceptance being made on the faith of that name. (Not necessarily so, because, if a fictitious, or even a real name had been inserted as that of the drawer by the person getting the bill with the knowledge and consent of the acceptor, it could not be said that the acceptance was on the faith of the drawer's name). But the Exchequer Division held that the case "must be governed by the rules of law applicable, not to cases in which the acceptor has signed his name after that of the drawer has been inserted, but by those which ought to prevail when the acceptor has signed his name upon a blank piece of stamped paper, or on a paper upon which a drawing in blank has been written." It was remarked that the case differed from that of a forged indorsement of the name of a real drawer in this among other respects: that, in such a case, the acceptor, even supposing he paid to the bank, would still be liable to the drawer, while in this case he was not. The court observed that the question was one of some difficulty. We confess we do not see the difficulty. When it is admitted that the acceptor would have been liable, if a fictitious name had been inserted as that of the drawer and indorser, the whole case is abandoned. It is of no avail to say that it could not have been intended to authorize a forgery to be committed by inserting a real name. It might just as well be said that it could not have been intended to commit a forgery by inserting a fictitious name, and a forgery can be committed by using a fictitious just as much as by using a real name. And as regards the question of who is to bear the loss, if the *bona fide* onerous owner were to suffer, what would it matter to him whether the name inserted was a real or a fictitious name? And what does it matter to the acceptor? He has given an opportunity of perpetrating a fraud, and it is of little moment to him in what manner it is perpetrated. The supposed difficulty probably arose from the way in which the case was put on behalf of the acceptor. The argument for him proceeded on the assumption that such cases depend on the principle of implied mandate, which we have seen is not the true principle. Even, as for that matter, it does not seem to us that there is any implied mandate to insert a fictitious name any more than to insert a real name. The truth is, that a wrong was done, and, on the principle already stated, the party who must suffer for it was the acceptor, who had been guilty of gross negligence in signing a blank bill and parting with it without getting the money. In a question between the defendant and Villars, who discounted the bill at the bank, evidence of the kind which was rejected, and as to how Villars got possession of the bill, would have been admissible. It is evident that he had not got the bill from Head, who, it is to be presumed, knew nothing about the matter.

Where a bill or cheque has been so carelessly written that the sum originally inserted has been altered to a larger amount, of course, without its being discernible that an alteration has been made, the original signatory is liable for the increased amount to an innocent holder for value, assuming in the case of a bill that the holder has received it before maturity, and that the stamp will cover the amount. The leading case on this subject is the well-known and often-discussed case of Young v. Grote.[7] There a customer of a bank had signed several blank checks and intrusted them to his wife, desiring her to fill them up according to the exigencies of business. She instructed a clerk to fill up one of the checks

[7] 4 Bing. 253; 1 Ross's Leading Cases on Commercial Law, 186.

with the sum of £52 2s. 3d. The clerk did so. On being shown to the lady, the third line of the check contained the words "fifty-two pounds 2s. 3d.," these words commencing in the middle of line, and the word "fifty" being spelt with a small "f." Afterwards the clerk inserted the words "Three hundred and" before the word "fifty," and the figure "3" between the "£" and the "5" in the figures at the bottom of the check. These alterations were made in such a way that a person using due and ordinary diligence would not discover that they had been improperly and fraudulently made after the draft on the bank had been filled up for another sum. The check, as altered, was presented to the bank, and the £352 2s. 3d. was paid. The bank was held entitled to take credit for the whole amount. Chief Justice Best said: "Undoubtedly a banker who pays on a forged check," and the alteration to a larger sum is forgery,[8] "is in general bound to pay the amount again to his customer; because, in the first instance, he pays without authority. On this principle the two cases which have been cited," one of which was Hall v. Fuller,[9] "were decided, because it is the duty of the banker to be acquainted with his customer's handwriting, and the banker, not the customer, must suffer if a payment be made without authority. But though that rule be perfectly well established, yet, if it be the fault of the customer that the banker pays more than he ought, he can not be called upon to pay again. That principle has been well illustrated by Pothier, in commenting on the case put by Scacchia: 'Cependant, si c'etait par la faute du tireur que le banquier eut ete induit en erreur, le tireur n'ayant pas eu le soin d'ecrire sa lettre de maniere a prevenir les falsifications; puta, s'il avait ecrit en chiffres la somme tiree par la lettre, et qu' on eut ajoute zero, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, a laquelle le tireur par sa faute a donne lieu; et c'est a ce cas qu'on doit restreindre la decision de Scacchia.' "

The leading Scottish case on the subject is Pagan v. Wylie.[10] The sum in the bill was altered from "eight" to "eighty-four" pounds. The court held there had been so much room left as to allow of the alteration being made without giving the bill a crowded and suspicious appearance, and accordingly the bank with whom the bill was discounted was held entitled to the whole sum of £84. It was observed that "where a blank is left on a bill sufficient to admit the insertion of part of one word and the whole of another, as in the present case, any person who puts his name upon it, whether as drawer, acceptor, or indorser, and trusts it in the hands of another, and particularly of the person by whom it was written, in order to its being passed by him into the circle, must be liable for the consequences in the same manner as if it had been left blank in the sum altogether; it being the same thing whether the blank be total or partial." And then the judgment proceeds to rest the case on the absurd ground of tacit mandate: "The circumstance of leaving a blank must be held as a tacit mandate from the parties whose names were upon the bill, entrusting the holder with the power of filling it up; and therefore the present case differs from a forgery or vitiation, for then one writing is converted into another, without the consent of the parties either express or implied." It occurs to us to remark that, if there was a tacit mandate to fill up the blank, it would not matter whether, when altered, the bill had a crowded and suspicious appearance or not. The whole importance of the circumstance that the blank had been filled up without giving the bill a suspicious appearance lies in this, that it defeats any allegation of negligence on the part of the bank or other onerous holder, and throws the whole blame, and the consequences of the blame, on the person who had written the bill so carelessly. The circumstance of the bank being able or not being able to discover the interpolation does not affect the question whether there was or was not a tacit mandate. Surely, it cannot be said that there was a tacit mandate to perpetrate a fraud if it could be perpetrated without detection, and no tacit mandate if it could not be so perpetrated, or was not so perpetrated. The case of Graham v. Gillespie[11] is similar. The sum in the bill was changed from £58 10s. to £458 10s.,

[8] See, among other cases, Reg. v. Wilson, 17 L. J. Rep. M. C. 82.

[9] 5 B. & C. 750.

[10] 1793, Mor. 1660; 1 Ross's Leading Cases on Commercial Law, 194.

[11] 1795 Mor. 1453; 1 Ross's Leading Cases on Commercial Law, 195.

which the perpetrator of the fraud was enabled to do "in consequence of a blank being left between the '£' and the '5' at the top of the bill." "The fraud," it was stated, "was so well executed that it would scarcely have been discovered unless by a person aware of it." The acceptor was held liable. In the comparatively recent English case of Guardians of Halifax Union v. Wheelwright [12] the circumstances were, in regard to the point under consideration, very similar. The defendant, the manager of a bank, acted as treasurer to the guardians, and acted gratuitously. The account between the guardians and their treasurer was duly kept; moneys were from time to time paid in to account of the guardians to the bank of which the treasurer was the manager, and orders signed by the guardians were cashed like checks payable to order. A person in the service of the clerk to the guardian who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in blank spaces; and after signature of orders he increased the amounts accordingly, sometimes adding the word "teen" after the word indicating the number of pounds, and before the word "pounds" sometimes prefixing "twenty" or "thirty" to the written words, and by altering the figures to correspond. This person also forged indorsements to orders so increased in amount and to orders not so increased, and got payment from the bank. The Court of Exchequer held that the negligent drawing of the orders disentitled the plaintiffs to complain of the payment of the excess, and also that as to payment of checks with forged indorsements, the account was really the account, not with the manager of the bank, but with the bank, and that the bank was protected by the Act 16 & 17 Vict, c. 59, s. 19.

In this case reference was naturally made to Young v. Grote. On the part of the plaintiffs it was argued that the reasons for that decision were uncertain, and that different and contradictory reasons had been given for it. This is, no doubt, quite true. Even the same judge had given contradictory explanations of this case. Baron Parke, in Robarts v. Tucker, [13] put it on the ground that the customer of the banker had "by signing a blank check given authority to any person into whose hands it came to fill up the check in any way the blank permitted." But the same learned judge, one of the consulted judges in the later case in the House of Lords, [14] explained the case on another and simpler ground. He said, "In that case it was held to have been the fault of the drawer of the check that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the check, which admitted of easy interpolation, and, consequently, that the drawer, having thus caused the banker to pay the forged check by his own neglect in the mode of drawing the check itself, could not complain of that payment."

In this case of Halifax Union v. Wheelwright, Baron Cleasby, giving the judgment of the court, said: "It is true that there is some difference of opinion as to the proper legal ground for the conclusion, and perhaps some difficulty in determining which is the soundest. It is put on the ground of the negligence itself disentitling the party guilty of it. * * * In Swan v. North British Australasian Company, Cockburn C. J., preferred putting the conclusion on the ground of avoiding circuity of action, which is certainly the most exact ground, and which agrees with what is said by Pothier in the passage referred to. But these various reasons for the conclusions only show how incontestable the conclusion itself is, and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any country, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own."—*Journal of Jurisprudence.*

[12] 1875, L. Rep. 10 Ex. 183.

[13] 16 Q. B. 560.

Bank of Ireland v. Evans' Charities, 5 H. L. C. 389.

GUARANTY—ACCEPTANCE— CONSIDERATION.

DAVIS v. WELLS.

Supreme Court of the United States, October Term, 1881.

1. The rule, requiring notice of the acceptance of a guaranty and of an intention to act under it, applies only in those cases where, in legal effect, the instrument is merely an offer or proposal, acceptance of which by the guarantee is necessary to that mutual assent, without which there can be no contract.

2. If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which passes at the time the undertaking is given from the guarantee to the guarantor; and equally so, where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates by its recitals a privity between the guarantee and guarantor. In each of these cases, the mutual assent of the parties is either expressed or necessarily implied.

3. When a guaranty is expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt of which is therein acknowledged, it is not an unaccepted proposal, requiring notice of acceptance to bind the guarantor, but without such notice becomes binding on delivery.

4. Where a guaranty declares that the guarantor thereby guaranties unto the guarantee, unconditionally at all times, any advances, etc., to a third person, notice of demand of payment and the default of the debtor is waived, as well as notice of the amount of the advances, when made, when either or both would otherwise be required.

5. But a failure or delay in giving such notices, if required, is no defense to an action upon the guaranty, unless where loss or damage has thereby accrued to the guarantor, and then only to the extent of the loss or damage proved.

6. Notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit, and liberally to promote the use and convenience of commercial intercourse.

In error to the Supreme Court of the Territory of Utah.

Mr. Justice MATTHEWS delivered the opinion of the Court:

The action below was brought by Wells, Fargo & Co., against the plaintiff in error, upon a guaranty, in the following words: "For and in consideration of one dollar to us in hand paid by Wells, Fargo, & Co., (the receipt of which is hereby acknowledged) we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.

"This guarantee is to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated, Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. [Seal.]
"J. N. H. PATRICK. [Seal.]

"Witness: J. GORDON."

The answer set up, by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants. On the trial it was in evidence, that this guaranty was executed by defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co., were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co., permitting it on the faith of the guaranty from that time until July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendants' counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third, and fifth: 1. If the jury believes from the evidence that the guaranty sued upon, was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co.. it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it, and, if they neglected or failed so to do, the defendants are not liable on the

guaranty, and your verdict must be for the defendants. 2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became, and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements, of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants. 3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that, if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not in contemplation of law a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants. 5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted: 1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount ten thousand dollars, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance, and action thereon by plaintiff, bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of, and since the date of said delivery of said guaranty, and which were unpaid at the date of the commencement of this suit, not exceeding ten thousand dollars. 2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding ten thousand dollars, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on amount found due at such statement, from the date thereof, at the rate of ten per cent. per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raises the question whether the guaranty becomes operative if the guarantor be not within a reasonable time informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this court. It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case. In Adams v. Jones, 12 Pet. 207, Mr. Justice Story, delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary, and this is not now an open question in this court, after the decisions which have been made in Russell v. Clarke, 7 Cranch, 69; Edmonston v. Drake, 5 Pet. 624; Douglas v. Reynolds, 7 Pet. 113; Lee v. Dick, 10 Pet. 482; and again recognized at the present term in the case of Reynolds v. Douglas, 12 Pet. 497. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own." In Reynolds v. Douglas, 12 Pet. 504, decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be "that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted;" and added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and

circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule, and consequently, some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formally declared to be so by Mr. Justice Nelson, speaking for the court in delivering its opinion in the case of Louisville Manufacturing Co. v. Welch, 10 How. 475, where he uses this language: "He [the guarantor] has already had notice of the acceptance of the guaranty, and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in Wildes v. Savage, 1 Story, 22, Mr. Justice Story, who had delivered the opinion in the case of Douglas v. Reynolds, 7 Peters, 113, after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between the parties. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemlatedd is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell's Cases on Contracts, 987), "though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in Wildes v. Savage, *supra*, where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which passes at the time the undertaking is given from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor. For, in each of these cases, the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief:

"For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the

party offering himself as security, before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound, not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times," etc.,—can not have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place. a complete and perfect obligation of guaranty. That evidence we find in the words—"for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee, &c." How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made as to a guarantee, substantially the same as this, in the case of Lawrence v. McCalmont, 2 Howard, 452, and was overruled. Mr. Justice Story said: "The guarantor acknowledged the receipt of the one dollar and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nomimal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in Dutchman v. Tooth, 5 Bingh. New Cas. 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and six pence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms. It does not effect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a complete contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety and cannot be separated into distinct parts. The covenant is single and cannot be subjected in its interpretation to the operation of two diverse rules. Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that Gordon delivered it to them. But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of fuure advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., &c., to the extent and not exceeding ten thousand dollars, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co." Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we can not doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit, and liberally to promote the use and convenience of commercial intercourse.

This view applies with equal force to the excep-

tions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions—1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and 2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty. For, if the necessity, in either or both of these contingencies existed, to give the notice specified, it was because the duty to do so was, by construction of law, made a condition of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions waived. It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense. If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision of this court in the case of Louisville Manufacturing Co. v. Welch, 10 How. 461-475. An unreasonable delay in giving notice, or a failure to give it altogether, is not a bar, of itself. There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty; and it was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record, and the judgment is affirmed.

SERVITUDES — CONVEYANCE — SALE UNDER FORECLOSURE.

CHRIST'S EPISCOPAL CHURCH v. MACK.

New York Supreme Court, October 28, 1881.

Plaintiff, a church, sold land adjoining the church-building to the defendant, J M, under an agreement that the use of the light from all openings on that side should be reserved. Defendant, J M, then conveyed the property to a third party, who executed a deed to defendant, R M, wife of defendant J M. A mortgage pre-existing upon the property, which had been assumed by J M and his grantee, was foreclosed, and the property sold, and R M became the purchaser. *Held*, that the title which she so acquired was not paramount to that which the plaintiff had conveyed to her husband, and was not relieved of the restrictions contained in the deed to him.

Appeal from a judgment recovered upon the report of a referee.

W. H. Peckham, for appellant; *Boardman & Boardman* for respondents.

DANIELS, J., delivered the opinions of the court:

The action was brought to restrain the continuance of certain erections upon premises owned by the defendant, Rhoda E. Mack, and adjoining on the south the church property of the plaintiff. The church edifice, as well as the property in controversy, are situated on the southeasterly corner of Thirty-fifth street and Fifth avenue, in the City of New York. On the 12th day of February, 1859, the trustees of the plaintiff entered into an agreement, under seal, with the defendant, John Mack, for the sale of the land on the southerly side of and adjacent to that upon which the church edifice had been erected. By the terms of the agreement when made, it was declared and provided that the use of light from all openings on the north side of the lot should be reserved for the use of the parties of the first part (the plaintiff), with the privilege to the party of the second part to build over one and to the second window of the basement, supported on pillars, so as not to close up said windows; and that no shrubbery should be allowed to grow, or any other obstacle be placed in front of said windows, so as to exclude the admission of light. And these restrictions were declared to be binding on the successors in office, heirs, administrators, executors and assigns of the respective parties, so long as the adjoining property on the north side of the lot should be used for church purposes. On the 3d of March, 1859, the plaintiff, in compliance with this agreement, conveyed the premises adjacent to the church lot upon the south to the defendant, John Mack. After that, and in the month of May, 1863, he conveyed the same premises to Blanche Chaudurgue, who, on the same day, executed and delivered a deed of the same property to the defendant, Rhoda E. Mack. By the terms of the agreement restricting the use which might be made of the property sold by the plaintiff, a servitude in its favor was created. It was an interest in, or burden imposed upon, the property, which was valuable to the plaintiff, and legally created by the instrument, executed by the parties to it. Rome & Watertown R. Co. v. Ontario R. Co., 16 Hun, 445. And as the deed conveying the property was in terms rendered subject to the covenants contained in the agreement, the title conveyed was, to that extent, qualified and limited; and persons afterwards acquiring that title under the plaintiff's grantee, took it subject to

that restraint and qualification. The terms of the record itself were sufficient to put them upon inquiry and charge them with notice of the rights the plaintiff was entitled to enjoy, notwithstanding the conveyance of the property by the deed. Childs v. Clark, 3 Barb. Ch. 52. In addition to this circumstance, the deed from the plaintiff's grantee was made for the sole purpose of placing the title to the premises in his wife. And his grantee immediately executed that purpose by delivering the deed to consummate it. No pecuniary consideration whatever entered into either of these deeds, but they were executed solely for the purpose of making the defendant, Rhoda E. Mack, the owner of the property. After she became such owner, a mortgage, previously existing against the property, was procured by her to be foreclosed, and upon the sale made under the judgment, she became the purchaser. And after that she made the erection now in controversy, which violated the restraints and provisions subject to which the plaintiff conveyed the property to her husband. At the time when the plaintiff acquired its title to the property, that mortgage existed against it, amounting to the sum of $11,000. In the conveyance made to the plaintiff, the grantor, who was liable for the payment of the mortgage debt, made it subject to the mortgage, and the plaintiff thereby assumed its payment. In like manner when the property was conveyed to John Mack by the plaintiff, it was made subject to this mortgage, and he also assumed its payment. But in the deed made by him, that personal obligation was not imposed upon the grantee, neither did his grantee attempt to impose it upon the defendant, Rhoda E. Mack, but it was simply declared that the grant was subject to that mortgage. The grantee in the last deed, insisting after the mortgage sale that her title to the land was acquired under the foreclosure sale, claimed to hold it freed from the restraints imposed upon it by the contract between her husband and the plaintiff, in effect preserved by the deed from the latter to her, and under that claim she deemed herself at liberty to use the property as its sole and unqualified owner in all respects. Whether she can be protected in this position, and allowed to disregard the obligations of servitude, to which the property was carefully subjected by the contracts and conveyance of the plaintiff, is the point to be determined for the disposition of the present appeal. As she acquired her title from her husband with notice, and probably with full knowledge of the burdens imposed upon the premises in the plaintiff's favor, she was equitably bound to observe and maintain them, and procuring the mortgage, to which her title was also subjected, to be foreclosed and a sale made for the apparent purpose of merely relieving herself from this obligation, was in violation of the duty existing upon her part to the plaintiff. But still, if the legal right acquired by her under the foreclosure sale is to be attended with the effect claimed for it, her position must accordingly be sustained. But by the conveyance which was made from the party who held the title, subject to the lien of the mortgage, the plaintiff acquired the legal estate in the land. And the same estate, subject to the servitude, was acquired by its grantee, and subsequently passed in the same manner to the defendant, Rhoda E. Mack. By these deeds she became the legal owner of the property, and the outstanding mortgage upon it was merely a lien of security for the payment of the mortgage debt. Runyan v. Mersereau, 11 Johns. 534; Keurtright v. Cady, 21 N. Y. 343, 347; Stoddard v. Hart, 23 N. Y. 556. This legal title was neither changed nor divested by the sale to the person holding it in the foreclosure proceedings. After that, as well as before, she continued to hold the title to the premises by virtue of the deeds made by the plaintiff and its grantee. And the deed executed to her in compliance with the terms of the sale, in the foreclosure action, simply operated as a release of that security upon the property. This appears to follow from the effect given to conveyances of this nature by the statute. For it has been declared in plain terms that such a deed shall be as valid as if the same were executed by the mortgagor and mortgagee (3 R. S., 5th ed., 273, sec. 88). In the present instance, it could not operate upon the title of the mortgagor, for he had previously conveyed that away, and it had been effectually acquired by this defendant through the conveyances preceding, and that executed to her. She already held her title subject to this mortgage, and its lien as a security; and the sale to her, consequently, was equivalent only to a deed executed by the mortgagee. It transferred to her simply his rights and interests, for she had previously become the owner of the residue of the estate in the land. It was, in substance and effect, simply a release of the property from the mortgage, and to that extent enlarging her interest without superseding or changing that previously acquired by her. The consequence is, that she did not, by her purchase at this foreclosure sale, acquire a title to the property paramount to that conveyed to her husband by the plaintiff, but that she continued to hold it as she had before; only from the time of the sale it was relieved from the lien of this mortgage. The sale and conveyance to her, therefore, did not relieve the property from the burdens and restrictions subject to which the plaintiff conveyed it, but she was bound to observe and perform them, for the reason that she had received the legal estate from it subject to that obligation. It does not appear precisely when the erection was made which formed the subject of the plaintiff's complaint, but it does not appear that it was of such a nature as to interfere with and obstruct the use of light in such a manner as to constitute a breach of the covenants or conditions qualifying the title conveyed by the plaintiff to John Mack.

No case was made entitling the defendant to the benefit of the statute of limitations, for it did

not appear that the fence erected had existed so long as to be protected by either of its provisions. The case was not disposed of upon that ground, but solely because this defendant had acquired a title to the property which relieved it of the servitude imposed upon it before the time when she received her deed. This was an erroneous view of the rights and obligations of the parties. For, as before observed, the defendant's title remained entirely unchanged, except in the circumstance that it had been relieved from the lien of this pre-existing mortgage.

The judgment in the case should be reversed, and, upon the facts found in the decision of the learned judge before whom the trial took place, judgment should be awarded in favor of the plaintiff, requiring the removal and discontinuance of the erection forming the subject of the complaint in this action.

All concur.

NEGOTIABLE PAPER—INNOCENT HOLDER—MATERIAL ALTERATION.

SUFFELL v. BANK OF ENGLAND.

[*English High Court, Queen's Bench Division.*

An alteration in the number of a note of the Bank of England is not such a sufficient and material alteration of the note as to enable the bank to refuse payment of the same to a *bona fide* purchaser for value without notice. The plaintiff became a *bona fide* holder of certain notes of the Bank of England, which were obtained by means of a successful forgery, and the numbers of which were altered to escape detection. The plaintiff demanded payment of the notes, and the bank refused to cash them. The plaintiff thereupon brought his action, and the matter was reserved for further consideration. *Held*, that the plaintiff was entitled to recover in the action, and that the alteration in the numbers of the notes was not such a material alteration as entitled the bank to refuse payment to a *bona fide* holder.

This case was tried before Lord Coleridge, C.J., and a special jury at Guildhall, on the 5th April, 1881. The material facts were admitted, and the jury were discharged, and the point of law reserved for further consideration. The pleadings in the action were as follows.

Claim.

1. The plaintiff is a money changer, carrying on business in Brussels.

2. Upon the 10th of January, 1880, the plaintiff purchased from a person ten notes issued by the defendants dated the 3d September, 1878, for 20*l.* each, payable to bearer on demand, and also six notes issued by the defendants dated the 2nd July, 1878, for 50*l.* each, payable to bearer on demand.

3. The plaintiff has demanded from the defendants payment of the notes aforesaid, but the defendants have refused to pay the same.

Defense:

1. The defendants admit that on the 20th April, 1880, when the notes were presented for payment, they refused, and still refuse, under the circumstances hereinafter appearing, to pay to the plaintiff the alleged value of the notes sued upon, or any of them, amounting in the whole to $500*l.* The said notes purport to be Bank of England notes made by the defendants.

2. The defendants say that they did not make and issue the said bank notes bearing the said numbers, and that the notes sued upon have been feloniously and fraudulently forged and altered after the same were made and issued by the defendants, and have, with intent to defraud, been feloniously made to resemble certain other bank notes made and issued by the defendants.

3. The defendants have, since 1694, made bank notes and issued them as required by law.

4. As a material means to identify the bank notes so made and issued, as well by the defendants as by the holders thereof, and also for the security of the public and the detection of crime, and for the purposes of discharging the duties in respect of the issue of bank notes and of accounting for the issue of notes, and as and for a part of the bank notes so made and issued the defendants have always printed or marked certain numbers and letters thereupon, not being the amount or sum therein promised to be paid.

5. It is the course of business of the defendants that, upon the request of persons who have lost Bank of England notes, or who have been defrauded of them, to stop payment thereof when the same are presented upon such person informing them of the numbers and dates and amounts of such notes, and the protection so afforded by the defendants is publicly known.

6. The defendants, by certain bank notes, dated the 2nd July, 1878, and 3d September, 1878 (but not being the notes now sued upon), promised to pay to the bearers respectively on demand the sums of 20*l.* and 50*l.*

7. On or about the 17th April, 1879, divers forged bills of exchange, amounting to 8,300*l.*, accepted payable at certain bankers in London, were feloniously uttered and fraudulently presented for payment, and were cashed, and divers notes, then being genuine Bank of England notes, were given in payment thereof.

8. Forthwith, upon the forgery being discovered, the bankers gave the defendants notice of the numbers, dates, and amounts of the bank notes, and directed the defendants to stop payment thereof when presented. They also made publicly known the numbers of the notes so paid by them, and advertised notice of the same being stopped.

9. The alleged Bank of England notes now sued on were obtained from the defendants in exchange for those fraudulently obtained from the bankers in part payment of the forged bills of exchange mentioned in paragraph 7; and a holder thereof, fraudulently intending to procure the defendants to pay the same feloniously and with intent to

defraud, did forge and alter the same by erasing the numbers thereof, and did insert instead other numbers now thereon appearing, and did feloniously make the same resemble the genuine Bank of England notes mentioned in paragraph 6.

10. The notes now sued on being so feloniously altered were feloniously uttered with intent to defraud, and the defendants say that by reason of the alteration the notes are not bank notes made by them.

11. The defendants further say that by reason of the alterations herein set forth without their knowledge, authority, and consent after the same were issued, their liability to pay the same is discharged, and the bank notes are defaced and void.

12. The defendants in the alternative say that the bank notes have been altered in a material part, to-wit, by inserting the present numbers for the real numbers since they were issued by them without their knowledge, authority, or consent, whereby the defendants are discharged from liability to pay the same, and the bank notes are void.

Issue was joined upon the above pleadings.

W. G. Harrison, Q. C. (with him *H. D. Jencken* and *C. H. Anderson*), appeared for the plaintiff; *Sir John Holker, Q. C.* (with him *Cohen, Q. C.* and *H. D. Greene*), appeared for the defendants.

The arguments are sufficiently set forth in the judgment of the learned lord chief justice.

Cur. adv. vult.

COLERIDGE, C. J.—The short question in the case is whether the defendants can refuse to pay on some bank notes, undoubtedly issued by them, and which have come into the hands of the plaintiff as a *bona fide* purchaser of them for value without notice, upon the single ground that one of the figures in the numbers of the notes has been altered, no doubt fraudulently, and for the purpose, if possible, of preventing the notes from being traced. Other notes were procured from Payne, Smith & Co., the bankers in London, by a forged cheque; these notes were changed at the bank of England for the notes sued upon in this action, which notes were bought by the plaintiff, a banker at Brussels, in the ordinary way of his trade; and on them he sues the Bank of England, who refuse to pay. The determination of the action depends upon the question whether the notes have been altered in a material particular; and this question is a question of law. The leading authority on the subject is the well-known case of Master v. Miller, 4 T. Rep. 320; in error, 2 Hen. Bl. 141. There an unauthorized alteration in a bill of exchange, whereby the day of payment was accelerated, was held to avoid the instrument, even as against the innocent holder for value. The nature of the alteration, and therefore the original contract, being capable of proof, made no difference in the opinion of the judges. Buller, J., dissented, and I think was overruled rather than answered by the majority who decided the case, but so is the law; and there is no doubt that the breadth of the language both of Lord Kenyon and Eyre, C. J., taken literally, would cover this case. But it has always been held that the alteration which vitiates the instrument must be a material alteration, *i.e.*, must be one which alters or attempts to alter the character of the instrument itself, and which affects, or may affect, the contract which the instrument contains, or is evidence of. Sanderson v. Symonds, 1 B. & B. 426, and Aldous v. Cornwell, L. Rep. 3 Q. B. 573; 37 L. J. 201, Q. B., are clear authorities to show that an immaterial alteration will not do. My brother Lush, in his excellent judgment in Aldous v. Cornwell (*ubi sup.*) says that the decision in Sanderson v. Symonds (*ubi sup.*) was confined by the judges to policies of insurance. There are expressions in the judgments of the Lord Chief Justice and Park, J., which support his view—and the instrument in question was a policy. But the language of the judges, I think, goes beyond this; and Richardson, J., a very great and most accurate lawyer, does not in any way qualify the generality of his language. Catton v. Simpson, 8 A. & E. 136, is to the same effect; and though that case was expressly overruled in Gardner v. Walsh (25 L. T. 168; 5 E. & B. 83), it was so, not on the ground that an immaterial alteration avoided the instrument, but that the alteration in Catton v. Simpson (*ubi sup.*) was material. In the sense in which the word "material" has been used in all the cases I have been able to refer to, of which Master v. Miller (*ubi sup.*), Burchfield v. Moore (23 L. T. 143; 3 E. & B. 683), and Gardner v. Walsh (*ubi sup.*), are only examples, the alteration has been held material because it varied, or attempted to vary, the contract. Here the alteration is nothing of the sort. It is material in the popular sense, because it interposes some difficulty in the way of the Bank of England detecting, or helping to detect, the original fraud, by making it harder to trace the notes or stop them at the bank. But this is a wholly collateral matter. An alteration in this popular and collateral sense has never yet been held to vitiate an instrument in the hands of an innocent holder; and Sir John Holker admitted this in fact, but urged that the generality of the words in Master v. Miller (*ubi sup.*) was wide enough to take in this case, and that it was wise so to extend them. I do not think so, and I must decline the invitation. It needed a statute to make the crossing of a check a material part of it. It was argued that such an alteration as this would be within the mischief and the words of 24 & 25 Vic., c. 98, secs. 12-17, sections in a criminal statute, dealing with the forgery of bank notes and the making of plates from which the whole or any parts of bank notes may be unlawfully printed. It may be so, and, as at present advised, I think it is. But these sections were passed *diverso intuitu*, and, I think, have no bearing on the present question. I give judgment for the plaintiff, with costs.

Judgment for the plaintiff.

CONTRACT FOR SERVICES — SUNDAY — QUANTUM MERUIT — AMENDMENT AFTER VERDICT.

THOMAS v. HATCH.

Supreme Court of Wisconsin.

Where the jury, in a suit on a special contract for services, finds that the contract was made on Sunday, and also finds the value of the services, it is not error for the court to allow the complaint to be amended so as to claim a *quantum meruit* and give judgment for the value of the services as found by the jury.

Appeal from County Court, Winnebago County.

Crozier & Tyrrell and *Gabe Bouck*, for respondent; *W. B. Felker*, for appellant.

Action for services rendered by the plaintiff to the defendant as a farm hand from May 3d to July 3d, 1880, at $20 per month. The complaint alleges a special contract for the work at the above price per month, but for no specified time—and that the plaintiff left the service of the defendant by reason of sickness and inability to work. The answer alleges that the contract of hiring was for seven months, at the agreed price of $140; that the plaintiff left defendant's service at the end of two months without lawful excuse; that plaintiff's services were not reasonably worth to exceed $30; and that the defendant suffered certain specified damages by reason of the premises, for which he claims judgment.

On the trial in the county court the jury found specially that there was a contract between the parties that the plaintiff should work for the defendant at $20 per month; that no time of service was agreed upon; that the contract was made on Sunday; that the value of plaintiff's services was $20 per month; and that the defendant was damaged $5 by reason of the plaintiff leaving his service when he did. After verdict the court permitted the plaintiff to amend his complaint by alleging therein that the contract was made on Sunday, and that plaintiff's services to the defendant were worth $40. The court thereupon rendered judgment for the plaintiff on the special verdic for $40 damages, besides costs.

The defendant appeals from the judgment.

LYON, J., delivered the opinion of the court:

We think the record fails to disclose any error. The jury found that the contract of hiring mentioned in the pleadings was made on Sunday. It was therefore void, and on proper pleadings the plaintiff would be entitled to recover for his services *quantum meruit*. The court allowed the complaint to be amended after verdict to agree with the proofs. It was clearly within the discretion of the court to permit the amendment. Rev. Stat. 756, sec. 2830. It does not change the claim substantially, for it still remains a claim for two months' services. It only goes to the rule of compensation therefor. Moreover, the defendant's answer tenders an issue *quantum meruit*—the same issue raised by the amendment. Neither is it a sufficient objection to the allowance of the amendment that the defendant was, or may have been, unprepared to meet the new issue. If it took him by surprise, his remedy was to make that fact appear to the court, and the court would have protected his rights by the imposition of proper terms as conditions precedent to allowing the amendment. The amendment having been properly allowed, the special findings are within the issue and are supported by testimony; and beyond all question the judgment is sustained in the findings. The finding of damages to the defendant is entirely immaterial, for the reason that the other findings negative the defendant's right to recover any damages, and the court properly disregarded it and gave judgment for the full value of the services, as found by the jury.

The judgment of the county court must be affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.

November, 1881.

CORPORATIONS—NATIONAL BANKS—WHO IS A STOCKHOLDER.—While it may be true that a bank organized under the national banking law may not be bound to admit a purchaser of shares of stock in the association to all the rights and liabilities of the prior holder, unless the transfer is made on the books of the bank in the manner prescribed by the by-laws or articles of association, but where it does issue certificates of shares to a subsequent purchaser or lien in lieu of the certificates of the prior owner, without observing its by-laws, so far as creditors of the bank are concerned, a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National banking law. Opinion by SCOTT, J.—*Laing v. Burley.*

NEGOTIABLE PAPER—EVIDENCE—PRESUMPTION AS TO THE DATE OF A NOTE.—1. The law presumes that a note was executed on the day it bears date, and such presumption prevails until overcome by proof. 2. On a bill in chancery to set aside a judgment on a note on the ground that the note was given before the law authorized the complainant, a married woman, to execute such a contract, the note being dated on the day the law authorizing her to make contracts took effect, the burden of proof rests upon the complainant to establish her bill by a preponderance of evidence. 3. When the evidence upon a vital question of fact is conflicting and pretty evenly balanced, this court will not disturb the finding of the court below, which has superior facilities of judging the credibility of the witnesses on an oral examination in court. Opinion by SHELDON, J.—*Knisely v. Sampson.*

CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER—CREDIBILITY OF IMPEACHED WITNESS—1. On the trial of one for manslaughter, the defendant is allowed to give evidence only of his previous general character in regard to peace and quiet, etc.,and not proof of particular tranactions in which he may have been previously concerned. The witness cannot be called upon for his personal knowledge of the prisoner's acts and conduct. 2. On a trial of one for manslaughter in shooting his father, who was shown to be of a quarrelsome disposition when under the influence of liquor, and of an ugly temper, and abusive towards his wife, the defendant's counsel offered to prove by a witness that the defendant in going to and from his work had to pass by her house, and that she knew of her own knowledge that it had been the uniform habit of the defendant, at all times when he knew that there was at the time difficulty between his mother and the deceased, to refrain from going home, so as to keep out of the same, at such times expressing a desire to avoid being present, and that the difficulties between the deceased and his wife were of frequent occurrence at the time of the killing: *Held*, that all of such evidence was properly excluded. 3. On the trial of son for the shooting of his father while the latter was intoxicated and angry, and just succeeding a difficulty with defendant's mother, evidence of the previous conduct of the deceased towards his wife is not admissible as tending to show whether the shooting was accidental, or in self-defense, or was willfully and maliciously done. 4. On a charge of crime, the previous good character of the accused is but a circumstance to be considered by the jury in connection with all the other evidence in determining the question of guilt or innocence. If the evidence of guilt is complete and convincing when considered with the evidence of previous good character, the evidence of good character will not avail. 5. On the trial of one for manslaughter, an instruction that the defendant's evidence of his general reputation for peaceableness was allowable, and should be considered by the jury as a circumstance in the case; but that if from all the evidence in the case the jury were satisfied beyond a reasonable doubt of guilt of the accused, it was their duty to find him guilty, notwithstanding the fact that he had before borne a very good character for peaceableness, was *held* not erroneous as in effect, directing the jury to disregard the proof of good character. 6. An instruction that the testimony of a defendant in a criminal case is to be tested by the same rules applicable to other witnesses in determining his credibility and the weight of his evidence; and that if the jury, after considering all the evidence in the case, find that the accused has wilfully and corruptly testified falsely to any fact material to the issue, they have the right to entirely disregard his testimony, excepting so far as it is corroborated by other credible evidence, is not erroneous. The "other credible evidence," in such connection, includes all kinds and every kind of evidence. 7. The jury in a criminal case are not bound to believe the testimony of the defendant.any further than it may be corroborated by other credible evidence, and there is no impropriety in so instructing them. Affirmed. Opinion by SCHOLFIELD, J.—*Hirschman v. State.*

SUPREME COURT OF GEORGIA.

November 29, 1881.

WHAT CONSTITUTES A PARTNERSHIP.—1. If N furnished money to P to conduct business, and the latter was to let him have goods at cost prices, and nothing was said as to interest or profit and losses, this would amount to a loan, and would not constitute N and P partners. 2. If P represented to S that he was a partner to N, and so told N of such representations, and the latter acquiesced in them by silence or otherwise, N would be liable as a partner, and his liability would date from the making of such representations or the first credit given thereunder. Judgment reversed. Opinion by SPEER, J.—*Slade v. Paschal.*

EXEMPTION IN PARTNESHIP PROPERTY—1. A partner may have an exemption set apart out of partnership property. The assets of a partnership belong to the individuals composing the firm. The partnership is not a separate entity whose debts must be paid before the members have title to the property. (*a*). That a severance of the partnership propeity was made after levy by a creditor of the firm, and one member then applied for an exemption out of the part taken by him, did not affect his right to an exemption. 2. That all the partners in a firm had drawn their capital did not, *ipso facto*, take away the right of one of them to a homestead. Fraud must enter into the transactions to effect that result. 3, 4. One of the issues on an application for homstead being whether the applicant had made a full and fair disclosure of all his property, and it appearing that a firm of which he was a member, and from whose assets he sought to have the exemption made, had shortly before been in possession of a large amount of property or money, the burden was on applicant to account for it. Judgment affirmed. Opinion by CRAWFORD, J.—*Blanchard v. Paschal.*

VERDICT — NATURAL INTENDMENT. — Where distinct parcels of property are levied on under one levy, and all claimed by the same claimant, the whole tried under one issue, and a verdict rendered finding certain particular parcels of the property subject, the legal intendment of snch a verdict would be that the balance was not subject. (*a*). While it might have been more regular to have required the jury to have found explicitly as to all the lots before receiving the verdict, yet where the verdict has been returned and a judgment rendered ordering the *fi. fa.* to proceed against the parcels found subject, the judgment could subsequently be amended by declaring the

true intendment of the verdict and adjudging accordingly. (*b*). That a judgment has been before the Supreme Court for review and has been affirmed, will not prevent a subsequent amendment so as to more certainly declare the effect of the verdict. Judgment affirmed. Opinion by SPEER, J.—*Moses v. Eagle and Phœnix M'fg Co.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

58. A, B and C own as tenants in common a town lot. They contract with D to build a house thereon. They sign the contract as parties of the second part, and covenant "each for himself, and not for the others, binds himself to pay a proportionate part of the contract price, as his interest in the lot bears to the whole amount to be paid." Each has an equal interest in the lot. Now, under secs. 13 and 14 Colo. Code, corresponding with secs. 14 and 15, Parker's Cal. Code, and 36, 37, 38 and 39 of Kentucky Civil Code, and secs. 119 and 120 N. Y. Code, and sec. 38 Ohio Code, can D join as defendants in the same action as A, B and C when all the defendants have defaulted in payment under the contract? McD.

Gunnison, Col.

59. How should a *scire facias* on a forfeited bail bond be served in the State of Missouri on a surety, in case he be found in the county? Is the delivery of a copy sufficient, or should it be in the presence of two freeholders? Answer with authorities. C.

60. *a*. A offers a bribe or reward to procure his election as school trustee by a city council. May the authority having the power to elect the trustee assume that a vacancy exists, and proceed to elect a successor before a judicial declaration of a vacancy has been procured? *b* May a prosecutor file an information in the nature of a *quo warranto*, for the purpose of procuring a judicial declaration of a vacancy, without filing an affidavit on which to base the information? See 19 Ind. 356; 83 Pa. St. 105; 70 Pa. St. 465; 50 Miss. 607. Art. 11, sec. 6, Constitution Ind. The books do not seem to be clear as to when declaration is needful.

Muncie, Ind. H. M. S.

QUERIES ANSWERED.

Query 45. [13 Cent. L. J. 339.] W made contract of sale of flour to S, on condition that S should pay for the same on delivery, 80 miles from place of sale. W employed A to haul the flour and deliver it to S, provided it was paid for on delivery. A hauled the flour to the appointed place, and S not being there to receive and pay for the same, A left the flour in the warehouse of B, at the suggestion of B, he supposing the flour belonged to S. B assigned a book account he had against S to F, and F commenced an attachment suit against S, to satisfy the above account, and other accounts, and served process upon B, and garnisheed the flour and sold it. W afterwards demanded the flour of B, who refused to deliver it or pay the value. The only authority W gave A was to deliver the flour to S, provided S paid for it upon delivery. Can W maintain trover against B? Cite authorities. X. Y. Z.

Baker City, Oregon.

Answer. B, by accepting the flour from A, who was the agent of W, thereby undertook to keep and deliver the specific property to the rightful owner, and B thus became a bailee. Story on Bailments, secs. 45, 103. 124. B accepted the flour in the ordinary and usual course of his business, and in the same manner as he dealt with other customers; he had the right to demand compensation, and the trust, though accepted without special reference to a charge for his services, can not be construed as making only a gratuitous bailee. Pattison v. Syracuse National Bank, 4 Thomp. & C. (N. Y.) 96; Kirktland v. Montgomery, 1 Swan, 452. B should have ascertained definitely the rights of the parties in the flour before answering the garnishment, and this could have been done by communicating with A, and not to do so constituted negligence. As said by Willes, J., in Lord v. Midland R., L. R. 2 C. P. 344: "Any negligence is gross in one who undertakes a duty and fails to perform it." As the loss was brought about by B's instrumentality, the rule that "the intervention of irresistible force, whether of human or divine agency, excuses no hired bailee whose wrongful connivance or remissness of duty in any respect, whether for preventing the loss or lessening its injurious effects, proves to have occasioned the mischief," should be applied to him. See Smith v. Morgan, 22 Mo. 150; Jones v. Greenwood, 20 La. Ann. 297. The purchaser of the flour at the sale took no title, and trover can also be maintained against him. Telegraph Co. v. Davenport, 97 United States, 369; Blackman v. Lehman, 63 Ala. 547; McCall v. Powell, 64 Ala. 254. To establish a conversion, it must be shown that the defendant had actual or virtual possession of the goods. 4 Blackf. 317; 6 Barb. 436. A demand and refusal, or an actual conversion, are necessary to sustain an action of trover. Garvin v. Luttrell, 10 Humph. (Tenn.) 16; 10 Ind. 375; 32 Barb. 396; 42 Ills. 34. B. B. BOONE.

Mobile, Ala.

LEGAL EXTRACTS.

RECENT SCOTCH CASES ON NEGLIGENCE.

A man entered a public house desiring to enter a lavatory where he had been once before, but passing its door, he opened a door of a sunk cellar, whereby he suffered serious injuries: *Held*, that the publican was liable in damages assessed at £25. Per Lord Justice Clerk: "If this had been a solitary instance of an accident in this place I would have thought the case very narrow. But then we have two facts—first, before this accident there had been a prior one of the same nature, and second, that the defender seemed so alive to the danger that he took the precaution of keeping the cellar door always locked. These two things show, 1st, that this was a dangerous place; 2d, that the mistake was a natural one; and 3d, that the defender was perfectly conscious of the danger. Therefore, although I do not disguise the fact that the case is a narrow one, and, but for the elements I have noticed, would have been decided

the other way, I think the pursuer is entitled to prevail." Cairns v. Boyd, 6 S. C. 1004.

A proprietor let the fire clay on his lands, with leave to the tenant to erect houses for his workmen and make roads. A workman, on going from his house to work on a dark morning, by a road within twelve feet of an unfenced quarry, fell therein and was injured. In an action against the proprietor: *Held* (*dub.* Lord Gifford), that he was liable. Per Lord Ormidale: "The cottages and brickwork were on the defenders' property, and as it must be taken that rent or other consideration was given to the defenders for the use of the cottages, they were bound on their part to see that the inhabitants of the cottages and their visitors had a safe and reasonable access to and from them. I think it was the duty of the defenders to have fenced the quarry hole, and not to have left it as a trap or pitfall adjoining the path or road in question; and that having neglected to discharge this duty, they are answerable for the consequences." Per Lord Gifford: "The present pursuer is one of the workmen of the tenant, whose only right to go to this field at all arises from his employment by the tenant." "The tenant, I think, was bound to fence his own cottages and the roads to them, so as to make them safe for his own workmen; and I have a difficulty in seeing how the defenders become liable to make safe roads to cottages which they did not build, which they were not bound to maintain, and which, I suppose, the tenant might remove at his pleasure." "Whilst I have stated my difficulty, I am not prepared to dissent from your Lordship's judgment." Many English cases were cited. McFeat v. Rankin's Trustees, 6 S. C. 1043.

In an action at the instance of an old woman who, when crossing a street in daylight, was knocked down and injured, against the driver of the vehicle: *Held*, liable in damages. Per Lord Justice Clerk: "Where the driver of a vehicle drives over a person in broad daylight, I think there is the strongest presumption, both in fact and in law, that the driver was in fault." "It is suggested that the whole duty of the defender was to keep his own side of the street, to call out to any one he saw in the way, and then drive on. I can give no countenance to such a view of what a driver is bound to do. Here we have, on the one hand, a passenger doing what she was entitled to do—crossing the street—and, on the other hand, a driver who could quite well have pulled up if he had wished." Clerk v. Petrie, 6 S. C., 1076.—*The New York Daily Register.*

CHOATE'S METHOD OF CONDUCTING CASES.

"One of the most striking characteristics of Mr. Choate was the tenacity with which he persisted in trying a case once commenced, under no matter what disadvantages. If a case seemed untenable, and indeed always before suit, he was very willing to settle. Divorce cases and family disturbances, and suits between friends, he strained every nerve to adjust before they became public, and even after. But when a case was fairly before the court, he seemed absolutely to hate the idea of a compromise, and never felt the case lost so long as there was standing in court. No matter how hopeless seemed the chance of success, he would say, 'It will never do to say die,' and plunged boldly into the trial. And it was astonishing to find him so often successful when there seemed no hope. While a trial was going on in court, every word of every witness was taken down, and every legal incident noted. This was taken home, and before the court opened the next day, arranged and studied, and his argument commenced and kept along with the days of the trial, often changed and rewritten. He kept loose pay ar by him in court, on which were jotted down questions for witnesses, and ideas of al kinds connected with the case."—*J. H. Bell. Browne's Life, p.* 397.

NOTES.

——A person who was recently called into court for the purpose of proving the correctness of a doctor's bill, was asked by the lawyer whether the doctor did not make several visits after the patient was out of danger. "No," replied the witness; "I considered the patient in danger as long as the doctor continued his visits."

——The following notice by a Virginia blacksmith indicates readjuster sentiments on the part of Mose's partner: "Notis. — De copartnership heretofore resisting betwixt me and Mose Skinner is hereby resolved. Dem what owe de firm will settle wid me and dem what de firm owe will settle wid Mose."

——Recent deaths of judges suggest some reflections upon the thorough change which a few years have produced upon the bench. Within twelve years every judge on the common-law side has died, retired or been promoted. To take the Queen's Bench, Lord Chief Justice Cockburn and Justices Shee and Quain have died; Justice Blackburn has become Lord Blackburn; Justice Lush has become a lord justice. Sir John Mellor has retired, and Sir James Hannen has gone to the Divorce Court; in the Exchequer, the Chief Baron, Barons Channell, Piggot and Cleasby have died; Baron Bramwell has become a lord justice; in the Common Pleas, Chief Justice Erle retired, and Chief Justice Bovill died, and Justices Willes, Keating, Honyman and Archibald died; Justice Brett has become a lord justice; Justice Byles has retired, and Justice Montague Smith has been promoted to the Privy Council. On the equity side, death and retirement have produced the like effect. Lord Chelmsford, Lord Chancellor, Lords Justices Turner, Knight-Bruce, Rolt, Giffard James and Thesiger died; Lord Romilly died; Vice Chancellors Stuart, Kindersley and Malin retired; and Vice Chancellor Wickens died.—*Law Times.*